

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**M.R., Appellant**

**and**

**DEPARTMENT OF AGRICULTURE, U.S.  
FOREST SERVICE, Taos, NM, Employer**

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**Docket No. 14-549  
Issued: June 11, 2014**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
ALEC J. KOROMILAS, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On January 13, 2014 appellant timely appealed the July 24, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

**ISSUES**

The issues are: (1) whether appellant received an overpayment of \$359.93 for the period February 10 to March 9, 2013; (2) whether appellant was at fault in creating the overpayment; and (3) whether OWCP properly reduced appellant's 28-day compensation payments by \$75.00 as a means of recovering the overpayment.

**FACTUAL HISTORY**

Appellant, a 58-year-old former firefighter, was injured on November 9, 1987 when he slipped and fell on wet leaves. OWCP accepted his claim for cervical strain, low back strain and

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

left deltoid muscle tear. On March 13, 1996 it issued a loss of wage-earning capacity (LWEC) determination based on appellant's ability to earn wages in the constructed position of food assembler. Accordingly, OWCP reduced appellant's periodic rolls payments effective March 31, 1996. For more than 17 years, appellant received wage-loss compensation based on OWCP's March 1996 LWEC determination.

On April 1, 2013 appellant advised OWCP that he had not received his check for March 9, 2013. OWCP payment records indicated that a check in the amount of \$359.93 was disbursed on March 9, 2013. The payment covered the period February 10 to March 9, 2013. Based on appellant's representation, OWCP made arrangements with the U.S. Treasury to cancel the March 9, 2013 check. On May 10, 2013 OWCP reissued payment in the amount of \$359.93 for the period February 10 to March 9, 2013.

On or about May 16, 2013 OWCP learned that the original March 9, 2013 check had been negotiated. Thus, its record reflected that appellant had been paid twice for the period February 10 to March 9, 2013.

On May 30, 2013 OWCP issued a preliminary determination that appellant received an overpayment of \$359.93 for the period February 10 to March 9, 2013. Additionally, it determined that appellant was at fault in creating the overpayment because he accepted and cashed both checks.

On July 19, 2013 OWCP sent appellant a copy of the March 9, 2013 check that had been negotiated. It asked that he review the endorsement to determine if it was appropriate. If there was anything unusual, OWCP instructed appellant to submit the enclosed questionnaire which inquired, *inter alia*, whether he signed the check or if it had been cashed with his permission.

Appellant did not respond to either the May 30, 2013 preliminary overpayment determination or OWCP's July 19, 2013 correspondence.

By decision dated July 24, 2013, OWCP finalized its initial determination regarding the fact and amount of the overpayment. It also found appellant at fault in the creation of the \$359.93 overpayment. Because he was found at fault, appellant was not eligible for waiver of recovery of the overpayment. Additionally, OWCP ordered that \$75.00 be withheld from his continuing compensation payments.

### **LEGAL PRECEDENT -- ISSUE 1**

FECA authorizes payment of compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.<sup>2</sup> An overpayment arises where an employee receives multiple payments from OWCP for the same period of lost wages. Section 8129(a) of FECA provides authority for recovery of an overpayment made to an individual "because of an error of fact or law...."<sup>3</sup>

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<sup>2</sup> *Id.* at § 8102(a).

<sup>3</sup> *Id.* at § 8129(a).

### **ANALYSIS -- ISSUE 1**

In April 2013 appellant advised OWCP that he had not received his March 9, 2013 periodic rolls payment in the amount of \$359.93. OWCP promptly arranged cancellation of the March 9, 2013 check and issued another check for \$359.93 on May 10, 2013. However, the March 9, 2013 check that appellant reportedly had not received was ultimately negotiated. On July 19, 2013 OWCP provided him a copy of the endorsed March 9, 2013 check for his verification. While appellant did not acknowledge having signed the March 9, 2013 check, the account number appearing alongside the signature matched the account information he previously provided OWCP for purposes of electronic funds transfer (EFT/Direct Deposit). Accordingly, the record establishes that OWCP twice paid appellant \$359.93 for the period February 10 to March 9, 2013. Also, there is no evidence that appellant returned the May 10, 2013 duplicate payment. As such, appellant received an overpayment of \$359.93 for the period in question.

### **LEGAL PRECEDENT -- ISSUE 2**

OWCP may consider waiving an overpayment only if the individual to whom it was made was not at fault in either accepting or creating the overpayment.<sup>4</sup> Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he receives from OWCP are proper.<sup>5</sup> Recipients must show good faith and exercise a high degree of care in regard to receipt of their benefits.<sup>6</sup> A recipient will be found to be at fault with respect to creating an overpayment if he “[a]ccepted a payment which [he] knew or should have known to be incorrect.”<sup>7</sup>

### **ANALYSIS -- ISSUE 2**

OWCP found appellant at fault on the basis that he accepted payment which he knew or should have known to be incorrect. Whether an individual is at fault in creating an overpayment depends on the circumstance of the overpayment.<sup>8</sup> The degree of care expected may vary with the complexity of those circumstances and the individual’s capacity to realize that he is being overpaid.<sup>9</sup> In determining fault OWCP applies a “reasonable person” standard.<sup>10</sup>

As noted, appellant advised OWCP on April 1, 2013 that he had not received a check for March 9, 2013. In response, OWCP arranged for cancellation of the original payment and then issued another check for the same amount for the period February 10 to March 9, 2013. Less

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<sup>4</sup> *Id.* at § 8129(b); 20 C.F.R. § 10.433(a) (2012).

<sup>5</sup> 20 C.F.R. § 10.433(a).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at § 10.433(a)(3).

<sup>8</sup> *Id.* at § 10.433(b).

<sup>9</sup> *Id.*; *J.S.*, 58 ECAB 515, 521-22 (2007).

<sup>10</sup> *L.D.*, 59 ECAB 673, 679 (2008).

than a week after issuing the replacement check, OWCP learned that the original March 9, 2013 check had been cashed. The U.S. Treasury provided OWCP a copy of the negotiated check, which OWCP then forwarded to appellant for verification, but he did not respond.

Having previously advised OWCP that he had not received his March 9, 2013 payment, appellant knew or should have known that he was not entitled to both the original payment and the May 10, 2013 replacement check. The March 9, 2013 U.S. Treasury check clearly noted both the payment date and the period of compensation. It is probable that appellant was aware he had been twice compensated for the same period of wage loss. Accordingly, OWCP properly found appellant at fault in creating the overpayment.<sup>11</sup> Because appellant was at fault, waiver of recovery of the \$359.93 overpayment is not an option.<sup>12</sup>

### **LEGAL PRECEDENT -- ISSUE 3**

When an overpayment has been made to an individual who is entitled to further payments and no refund is made, OWCP shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors so as to minimize any hardship.<sup>13</sup> The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by OWCP.<sup>14</sup> This information is used, *inter alia*, to determine an appropriate repayment schedule, if necessary.<sup>15</sup>

### **ANALYSIS -- ISSUE 3**

Appellant did not respond to OWCP's May 30, 2013 preliminary determination, and therefore, did not submit an overpayment recovery questionnaire (OWCP-20). As such, there is limited information in the record regarding appellant's current financial circumstances. OWCP ordered that \$75.00 be deducted from his 28-day compensation payments of \$359.93. The approximate 21 percent reduction in benefits would resolve appellant's debt in less than six months, with minimal accrued interest (\$0.58). Under the circumstances, the Board finds that OWCP reasonably imposed a repayment schedule of \$75.00 every 28 days.

### **CONCLUSION**

Appellant received an overpayment of \$359.93 for the period February 10 to March 9, 2013. He was at fault in creating the overpayment, and therefore, he is not entitled to waiver of recovery. The Board further finds that OWCP reasonably imposed a repayment schedule of \$75.00 every 28 days to be withheld from appellant's continuing compensation payments.

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<sup>11</sup> 20 C.F.R. § 10.433(a)(3); *see Tammy Craven*, 57 ECAB 689, 691-92 (2006).

<sup>12</sup> 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433(a), 10.434.

<sup>13</sup> 20 C.F.R. § 10.441(a); *see* 5 U.S.C. § 8129(a).

<sup>14</sup> *Id.* at § 10.438(a).

<sup>15</sup> *Id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 24, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 11, 2014  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board